

III Remarks

A. Response to the Objection to the Incorporation of Subject Matter of International Application into the Application

The examiner has objected to Applicant's amendment to the specification as incorrect on the basis that WO 96/29859 has nothing to do with this invention. Applicant was asked to correct the amendment or explain. Applicant's explanation follows.

Applicant's amendment was in response to an United States Patent and Trademark Office Examiner's Action dated September 20, 2004. In that Action, the examiner stated the following:

The attempt to incorporate subject matter into the application by reference to WO 9629859 and WO 9858540 is improper because foreign references are not incorporable.

In Applicant's response to that Action, Applicant deleted from the specification the incorporation by reference. Applicant's amendment constituted a complete and correct response to the examiner's objection. The amendment does not become incorrect because the amendment failed to anticipate a new objection raised for the first time in the present Action.

In response to the objection, the reference in the specification to WO 96/29859 cited by the examiner has been changed to WO 96/29895 to correct the inadvertent transposition of the last two digits of the serial number.

B. Response to the Rejections Under 35 U.S.C. § 112

1. Response to the rejection of claims 1–15, 17 and 23–26 under 35 U.S.C. § 112, first paragraph

The examiner has rejected claims 1–15, 17 and 23–26 under 35 U.S.C. § 112, first paragraph, as failing to comply with the written description requirement. In support of this rejection, the examiner has stated:

... the claim(s) contains subject matter, which was not described in the specification in such a way as to enable one skilled in the art to which it pertains, or with which it is most nearly connected, to make and/or use the invention. The rejection of record is maintained. Table's applicant directs us to show minor antimicrobial effects (10,000 molds/g, control compared to 1,000) when treatment disclosed is not to post harvest tobacco, wheat or any other plant fruit or portion — it is to the whole plant culture (p. 26). The larvae have nothing to do with the claimed method.

(Examiner's Action, page 2)

Applicant's claims are now directed to a method of protecting wheat prior to harvest from microbial attack, comprising the step of applying to the surface of the wheat a narrowly defined antimicrobial composition. Support for these claims is found in part in **TABLE 1: Wheat**, which sets forth results of spraying wheat culture plants (*i.e.*, wheat prior to harvest, with Applicant's claimed antimicrobial composition (see page 27 of the specification).

**1. Response to the Rejection of Claims 1–15, 17 and 23–26
Under 35 U.S.C. § 103(a)**

The examiner has also rejected claims 1–15, 17 and 23–26 under 35 U.S.C. § 103(a) as being unpatentable over published International Patent Application WO 96/29895 to Schür, in view of United States Patent No. 5,747,416 to McCardle, Canadian Patent Publication No. 2012288 to Beilfuss et al., Published International Patent Application No. WO 98/54971 to Bessette et al. and United States Patent No. 5,091,405 to Stevenson, and further in view of United States Patent No. 1,331,331 to Erslev ("Erslev"). None of these publications discloses Applicant's claimed method for protecting wheat prior to harvest from microbial attack comprising the step of applying to the surface of the wheat prior to harvest Applicant's narrowly defined antimicrobial composition.

The Schür et al. Published International Patent Application does not disclose, exemplify or otherwise suggest to one skilled in the art Applicant's claimed method for protecting wheat prior to harvest from microbial attack comprising the step of applying Applicant's composition to the surface of the wheat prior to harvest. The Schür et al. Published International Patent Application is completely silent about any use of the Schür compositions to protect wheat prior to harvest.

The McCardle patent is directed to a protein polysaccharide complex used as a non-toxic and sustained release carrier for insecticides, herbicides, foliar nutrients and mixtures thereof. The McCardle patent also discloses methods for using a solution, solid or flowable impregnated protein-polysaccharide complex as a delivery agent for the control of plant populations and insect populations and as a preservative for cut flowers. See Abstract and Summary of the Invention at column 3, lines 3–50 and column 12, lines 2–3. The McCardle patent does not disclose, exemplify or even suggest to one skilled in the art Applicant's claimed method for protecting wheat prior to harvest from microbial attack comprising the step of applying Applicant's narrowly defined antimicrobial composition to the surface of the wheat.

Indeed, there is no disclosure or suggestion of using the compositions comprising a protein polysaccharide complex disclosed in the McCardle patent on wheat. Moreover, Applicant's claimed compositions do not comprise McCardle's protein polysaccharide complex. Accordingly, the McCardle patent cannot be used in combination with the Schür published International Patent Application to obtain Applicant's claimed method.

The Beilfuss et al. Canadian Patent Publication is directed to a mixture for use as a plant hygiene disinfectant. As disclosed in the Abstract, the mixture consists of:

- A) a naturally occurring phenol compound selected from the group thymol, guaiacol, eugenol, carvacrol, salicylic acid or its salts, methyl salicylate, p-cumaric acid, caffeic acid, ferulic acid, sinapic acid, sinapic alcohol or mixtures thereof in an amount from 1 to 80% by weight, and
- B) an aromatic alcohol selected from the group phenoxyethanol, phenethyl alcohol, benzyl alcohol, 2-phenoxypropan-1-ol, 1-phenoxypropan-2-ol, 3-phenoxypropan-1-ol, cinnamic alcohol, 2-phenylcyclohexanol or mixtures thereof in an amount from 20 to 99% by weight, in conjunction with
- C) wetting agents, surfactants and customary additives in an amount up to 15% by weight

as a plant hygiene disinfectant.

The Beilfuss et al. Canadian Patent Publication does not disclose Applicant's claimed method of protecting wheat prior to harvest by applying to the surface of the wheat a narrowly defined antimicrobial composition. Indeed, the Beilfuss et al. Canadian Patent Publication does not even contain an exemplification, disclosure or suggestion to one skilled in the art of using the Beilfuss et al. composition on wheat.

The Bessette et al. Published International Patent Application is directed to a pesticide and a method of using the pesticide to kill invertebrates, especially insects, arachnids and larvae. The Bessette method includes preparing a mixture of a carrier with an affector agent, which interferes with the neurotransmitters of the octopaminereceptor sites in the insects, arachnids and larvae, and applying the mixture to insects, arachnids, larvae and their habitat. In the EXAMPLES Section, the preferred blend of affector agent is alpha-terpineol, eugenol and cinnamic alcohol. The carrier is acetone. The Bessette et al. Published International Patent Application does not disclose Applicant's claimed method of preserving wheat prior to harvest from microbial attack. The Bessette et al. application also does not disclose Applicant's claimed method of applying to the surface of wheat Applicant's narrowly defined antimicrobial composition. Accordingly, the Bessette et al. application cannot be combined with the Schür,

McCardle and Beilfuss references to obtain Applicant's claimed method for use in preserving wheat prior to harvest.

The Stevenson patent is directed to pyrazolines and their intermediates, including all geometric and stereo-isomers of the pyrazolines and intermediates, agricultural compositions containing the pyrazolines and methods for use as insecticides. The Stevenson patent does not disclose, exemplify or even suggest to one skilled in the art a method for protecting wheat prior to harvest from microbial attack comprising the step of applying Applicant's antimicrobial composition to the surface of the wheat prior to harvest. As Applicant's antimicrobial composition consists essentially of certain ingredients that do not include pyrazolines and their intermediates and pyrazolines and their intermediates are an essential component of the Stevenson composition, Stevenson's composition, in fact, teaches away from Applicant's composition.

The Erslev patent is directed to a process for improving tobacco which comprises treating tobacco with a carbohydrate-containing liquid, other than an extract of tobacco, containing a culture of a defined group of microorganisms. Erslev, in fact, teaches away from Applicant's claimed method, which is directed to protecting wheat prior to harvest, from microorganisms. The Erslev patent does not disclose, exemplify or even suggest to one skilled in the art Applicant's claimed method for protecting wheat prior to harvest from microbial attack, comprising the step of applying Applicant's microbial composition to the surface of the wheat prior to harvest.

As the Erslev patent, like the other references cited in support of the rejection does not disclose Applicant's claimed method for protecting wheat prior to harvest from microbial attack comprising the step of applying Applicant's narrowly defined antimicrobial composition to the surface of the wheat, a rejection of Applicant's claims 1–15, 17 and 23–26 under 35 U.S.C. § 103(a) as being unpatentable over Published International Patent Application WO 96/29895 to Schür in view of United States Patent No. 5,747,416 to McCardle, Canadian Patent Publication CA 2012288 to Beilfuss et al., Published International Patent Application No. WO 98/54971 to Bessette et al., United States Patent No. 5,091,405 to Stevenson and United States Patent No. 1,331,331 to Erslev is untenable and should be withdrawn.


IV Conclusion

It is believed that the above constitutes a complete response under 37 C.F.R. Section 1.111 and that all bases of rejection stated in the Official Action have been adequately rebutted and/or overcome. Accordingly, a Notice of Allowance of United States Patent Application Serial No. 10/069,476 is requested as the next Office Action. The examiner is requested to telephone the undersigned attorney if any matters that can reasonably be expected to be resolved in a telephone interview are believed to impede the allowance of the pending claims.

Respectfully submitted,

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